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No. 80-1895

In the Supreme Court of the United States

OCTOBER TERM, 1980

EXXON CORPORATION, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL TRADE COMMISSION

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In its reply brief in support of its petition for a writ of certiorari, Exxon argues that the present case should be remanded for reconsideration in light of this Court's recent decision in *Federated Department Stores, Inc.* v. *Moitie*, No. 79-1517 (June 15, 1981), which was handed down after the Commission filed its brief in opposition.

This Court's decision in *Federated* is not relevant to the issues raised in Exxon's petition. That case was controlled, in the Court's words, by "accepted principles of *res judicata*." Slip op. 5. Those same accepted principles of *res judicata* establish that the court of appeals' order in this case would not bar

Exxon from obtaining review of the Commission's Franchise Rule if and when Exxon can show that a justiciable case or controversy has arisen between it and the Commission. It is well settled that dismissal of an action is *res judicata* only as to matters actually adjudged. *Smith* v. *McNeal*, 109 U.S. 426, 429 (1883); see generally *Restatement of Judgments* § 49 (1942); 1B *Moore's Federal Practice* ¶¶ 0.405[5], 0.409[1], 0.415 (Supp. 1980-1981). Here, the court of appeals took pains to make clear that its dismissal was not on the merits, stating expressly that the order was "without prejudice to the right of [Exxon] to contest the validity of the rule or its application in any appropriate future proceeding" (Pet. App. 1a). See generally *Public Serv. Comm'n* v. *Brashear Freight Lines, Inc.*, 312 U.S. 621, 626 (1941) (dismissal of counterclaim "without prejudice" is not dispositive of the claim on the merits).

Federated is irrelevant here for the additional reason that this case involves a Commission rule, not a private antitrust suit. The right to seek review of such a rule in an enforcement proceeding is expressly preserved by statute. Section 10(b) of the Administrative Procedure Act, 5 U.S.C. 703, provides that "[e]xcept to the extent that prior, adequate and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement." Moreover, Section 18(e)(5)(B) of the Federal Trade Commission Act, 15 U.S.C. 57a(e)(5)(B), excepts district court enforcement proceedings from the exclusive jurisdiction of the courts of appeals to review trade regulation rules.[1] Accordingly, the court

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[1] Section 18(e)(5)(B) provides in pertinent part (emphasis added):

of appeals' determination that no "case or controversy" currently exists between the Commission and Exxon with regard to the Franchise Rule does not diminish Exxon's statutorily protected right to obtain review of that rule if an enforcement proceeding is ever brought against it. In such a proceeding, a "case or controversy" clearly would exist.[2] By contrast, in the present case, Exxon has identified no activity that it currently engages in that might be affected by the rule and therefore has failed to allege an actual case or controversy with the Commission.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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The United States Court of Appeal shall have exclusive jurisdiction of any action to obtain judicial review (*other than in an enforcement proceeding*) of a rule prescribed under subsection (a)(1)(B) of this section, if any district court of the United States would have had jurisdiction of such action but for this subparagraph.

[2] As noted in the Commission's Brief in Opposition (at 6-7 n.4), other avenues of review also may be available if and when a case or controversy arises.

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